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No. 277.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,

v.

AMMEN FARENHOLT.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
AMMEN FARENHOLT.
} No. 277.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a claim by a passed assistant surgeon of the Navy with rank of lieutenant, for mounted pay from December 26, 1900, to July 27, 1901, during which time the claimant was on duty attached to the U. S. S. *Concord* and U. S. S. *Oregon*. (Rec., p. 1.)

In addition to the foregoing the petition asks for 10 per cent increase for services outside the limits of the United States, but this part of the claim has been abandoned by claimant.

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The case was tried in the court below, and the court made the findings of fact set forth in the record, pages 2 and 3, inclusive, and upon said findings based the following conclusion of law:

CONCLUSION OF LAW.

> Upon the foregoing findings of fact, the court decides as a conclusion of law, on the authority of *Richardson* v. *United States* (38 C. Cls., 182), that the claimant is entitled to recover against the United States the sum one hundred and forty-one dollars and thirty-three cents ($141.33).
>
> By a majority of the court. (Rec., p. 3.)

On March 26, 1906, judgment was rendered and ordered to be entered in favor of the claimant. (Rec., p. 4.) From said judgment the United States appeals to this court.

The amount in the judgment thus appealed from is insignificant. This is, however, what may be termed a "class case," and the decision of the court herein will affect the fifty passed assistant surgeons in the Navy in their yearly pay from June 30, 1900, when the act was past, providing for the office of passed assistant surgeons in the Navy.

THE STATUTES.

Section 13 of the so-called navy personnel act, past March 3, 1899, provides in part as follows:

> That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay

> Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army.
>
> (See 30 Stat. L., p. 1007.)

Section 1466, Revised Statutes, in fixing the status of officers of the Navy with reference to officers of the Army, commonly termed "assimilated rank," provides as follows:

> The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army shall be as follows, lineal rank only being considered:
>
> The vice-admiral shall rank with the lieutenant-general.
>
> Rear-admirals with major-generals.
>
> Commodores with brigadier-generals.
>
> Captains with colonels.
>
> Commanders with lieutenant-colonels.
>
> Lieutenant-commanders with majors.
>
> Lieutenants with captains.
>
> Masters (afterwards lieutenants of junior grades) with first lieutenants.
>
> Ensigns with second lieutenants.

The act of March 3, 1899 (sec. 7, 30 Stat. L., 1006), contains the following provision:

> *And provided further*, That all sections of the Revised Statutes which, in defining the rank of officers or positions in the Navy, contain the words "*the relative rank of*" are hereby amended so as to read "*the rank of*."
>
> * * * * *

Section 1261, Revised Statutes, provides in part as follows:

> The officers of the Army shall be entitled to the pay herein stated after their respective designations:
>
> The General: Thirteen thousand five hundred dollars a year.
>
> Lieutenant-general: Eleven thousand dollars a year.
>
> Major-general: Seven thousand five hundred dollars a year.
>
> Brigadier-general: Five thousand five hundred dollars a year.
>
> Colonel: Three thousand five hundred dollars a year.
>
> Lieutenant-colonel: Three thousand dollars a year.
>
> Major: Two thousand five hundred dollars a year.
>
> Captain, mounted: Two thousand dollars a year.
>
> Captain, not mounted: Eighteen hundred dollars a year.

Section 1262, Revised Statutes, provides:

> There will be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum on their current yearly pay for each term of five years of service.

It will be seen from the foregoing that the claimant, during the time covered by this claim, held the rank of lieutenant in the Navy and, as provided by section 1466, he ranked with a captain in the Army.

THE ISSUE.

Section 1466 recognizes captains in the Army *mounted* and captains *not mounted.*

The claimant contends that notwithstanding he was a naval officer and on board ship, and therefore had no use for a horse, yet he should be ranked, for the purpose of pay, with a captain in the Army mounted.

The Government's contention is that inasmuch as claimant had no use for a horse in performing his duties he ranks, for the purpose of pay, with a captain in the Army *not mounted.*

ARGUMENT.

One of the main purposes of the navy personnel act is to equalize the pay of naval officers with that of officers in the Army of equal rank. This view of the navy personnel act has been recognized by the Court of Claims in many so-called navy personnel cases. It has also been recognized by claimant's counsel and by this court in the case of *United States* v. *Crosley* (196 U. S. R., 332).

Mounted pay in the Army is given to recompense the army official who is required to be mounted for purchasing, maintaining, and keeping a horse. Whatever sum the mounted officer receives over and above the regular pay of his grade in the nature of mounted pay is in turn expended by him in the maintenance of his mount, and, therefore, notwithstanding he may receive more pay than his brother officer who is not

mounted, by reason of the necessary additional expenditures occasioned by his mount, the two captains in the Army are put upon an equality so far as actual compensation is concerned.

Section 1262, Revised Statutes, provides for longevity pay, and in computing the pay of claimant it is necessary for the accounting officers to take into consideration the question of longevity pay as fixed by said section. It is, however, not necessary here to consider the question of longevity pay, as the same in no way enters into the issue in determining the right of claimant to mounted pay. Aside, then, from longevity increase, as provided by section 1262, Revised Statutes, a captain in the Army mounted receives $200 a year more than a captain not mounted, as shown by section 1261, Revised Statutes. The theory is that this $200 per year is expended, as we have indicated, in the purchase of the officer's horse and of the maintenance of the same; so, as a matter of fact, the mounted captain has received at the end of the year no more compensation than the captain not mounted. The mounted captain, therefore, has no advantage in the way of compensation over his brother officer in the Army of like rank who does not receive mounted pay..

Officers of the Medical Corps of the Navy are not required to be mounted and, therefore, have no expenditures in the way of purchasing and maintaining a horse. The claimant, during the time covered by this claim, ranked with a captain in the Army; he served on United States battle ships; his service

was of such character that he could not use a horse. To grant him mounted pay would give him an advantage over his brother army officer with whom he ranks in the way of a gratuity of $200 per year, which sum he could not expend in the purchase and maintenance of a mount for use on the war vessels during the time he was so serving. Such a discrimination in favor of the naval officer is not in harmony with the principle of equality sought to be established by the navy personnel act between officers of the Navy and officers of the Army.

THE CROSLEY CASE.

The court has clearly exprest itself to the effect that only those naval officers whose duties require them to be mounted are entitled to mounted pay. In the case of *United States* v. *Crosley* the court said:

> We think these sections, with section 1301 of the Army Regulations, above quoted, read in the light of the statute (Rev. Stat., sec. 1270) giving to army officers the pay of cavalry officers of the same grade when assigned to duty which requires them to be mounted, indicate a general purpose to give to officers of the Army mounted pay when their duties are such as may require them to be actually mounted or are such as may at any time subject them to the necessity of rendering mounted service. The particular section (1301) under which it is insisted that a naval aid is entitled to mounted pay designates officers who either are or may be required to be mounted in the discharge of their duties and likewise to "officers on duty which, in the

opinion of the department commander, requires them to be mounted and so certified by the latter on their pay vouchers."

This paragraph was intended to include the particular class of officers who are entitled to pay as mounted officers under the classification in the first part thereof and gives the benefit of the higher rate of compensation to other officers not expressly named therein whose duties require them to be mounted. It may be true, as argued at the bar, that there may be times when the duties of an aid to a major-general will not require him to be mounted, but, as we understand the Army Regulations, such officers may be at any time required to render mounted service and are therefore given the pay of that class. Obviously, the duties of an aid to a rear-admiral are not such as to require him to render mounted service, and as the navy personnel act only undertakes to afford a measure of compensation for duties which can properly be required of a naval officer, it can have no operation to provide pay for services peculiar to the Army. As was held in *Thomas* v. *United States, supra,* it does not follow because Congress gives special pay to army officers that the same right of compensation applies to naval officers also. In that case it was held that an allowance to army officers who might be ordered to sea or a foreign port could not be given to naval officers whose regular duties require them to engage in service upon the sea and to cruise upon foreign waters and serve in foreign ports.

The present case affords still less reason for giving the pay of an army officer to one in the Navy where the compensation is given for a character of service which never can be required except in the Army.

Upon this branch of the case we think the Court of Claims was in error, and the judgment for mounted pay should not have been rendered in favor of the claimant.

The judgment of the Court of Claims is modified, disallowing the sums claimed in the petition and carried into the judgment on account of mounted pay and longevity pay based thereon and, as modified, is affirmed.

(See 196 U. S. R., 335 to 337, inclusive.)

In the light of the foregoing decision the claimant in the case at bar is certainly not entitled to mounted pay, inasmuch as he was a naval officer whose duties did not and could not require him to be mounted.

THE RICHARDSON CASE.

The claimant, on the trial of this case in the court below, insisted upon, and the court made, the following finding:

III.

PRIOR DECISION FOLLOWED.

Before the date of the decision of this court in the case of *Richardson* v. *The United States* (38 C. Cls., 182), January 5, 1903, assistant surgeons in the Navy received only the pay of an officer of corresponding rank in the Army "not mounted." By that decision it was held that they are entitled to the pay of

such an officer "mounted." This decision was not appealed from and has been accepted as the proper interpretation of the law. It has been applied by ruling of the Comptroller of the Treasury to passed assistant surgeons.

All officers of the Medical Corps in grades for which there is in the Army pay table a distinction between "mounted" and "not mounted" pay, have ever since been paid at mounted rates of pay for their service from the date the personnel act took effect, July 1, 1899, to the present time.

(Record, p. 3.)

It is true that Richardson was granted mounted pay; that the decision was not appealed from and has been accepted as the proper interpretation of the law. Furthermore, it is a fact that this ruling has been extended by the Comptroller of the Treasury to passed assistant surgeons.

The Richardson case was not appealed because, in the opinion of the officers of the Department of Justice, the decision is correct. But we deny that the ruling in the Richardson case is in any way applicable to the case at bar. We contend that the Comptroller of the Treasury committed error in extending the decision in the Richardson case to cover claims for mounted pay made by passed assistant surgeons. The court below followed this error of the Comptroller, as evidenced by its findings and conclusion of law.

As may be seen by the record, page 3, Richardson was an *assistant* surgeon in the Navy. The claimant

in the case at bar is a *passed assistant* surgeon in the Navy.

Assistant surgeons in the Navy are placed upon an entirely different basis as to mounted pay than passed assistant surgeons. There is an express statute which defines the rank of *assistant* surgeons and which provides that they shall rank with assistant surgeons in the Army, but this provision *is not extended to passed assistant* surgeons in the Navy. The act of June 7, 1900 (31 Stat. L., 697), provides in part as follows:

> The active list of surgeons shall hereafter consist of fifty-five and that of passed assistant and assistant surgeons of one hundred and ten. *Assistant surgeons shall rank with assistant surgeons in the Army.*

Upon the last sentence of the foregoing statute, which provides that assistant surgeons of the Navy shall rank with assistant surgeons of the Army, rests the whole superstructure of the Richardson case, and it is not applicable to any officer of the Navy other than assistant surgeons. The foregoing statute specially provides that Richardson, being an assistant surgeon in the Navy, should rank with assistant surgeons in the Army, but its provisions do not extend, as we have seen, to *passed assistant* surgeons in the Navy. Assistant surgeons in the Army being mounted, the court very justly granted mounted pay to Richardson, who ranked with assistant surgeons in the Army; but had the Congress intended passed assistant surgeons in the Navy to

receive mounted pay it would have made provision whereby such passed assistant surgeons should rank with passed assistant surgeons in the Army. The absence of any such provision in the statute quoted is conclusive evidence that the Congress did not intend that the special privilege granted to assistant surgeons should be extended to passed assistant surgeons. For this reason the judgment in the case of Richardson was not appealed from, and for the same reason we contend that the Comptroller and the court below were in error in extending the ruling in the Richardson case to cover claims made by passed assistant surgeons for mounted pay.

SECTION 1168, REVISED STATUTES.

The claimant in his petition seems to rely upon that part of section 1168, Revised Statutes, which fixes the pay of assistant surgeons in the Army with the rank of captain. An examination of said section, together with that portion of the act of June 7, 1900, found at the foot of page 697, 31 Stat. L., will convince the court that the latter statute revised and supersedes the former with respect to assistant surgeons. Section 1168 provided for one hundred and fifty assistant surgeons, but made no provision whatever for the office of passed assistant surgeon, while the act of June 7, 1900, makes provision that the active list of passed assistant and assistant surgeons of the Navy shall consist of one hundred and ten, and then makes the further pro-

vision which we have quoted, to wit: "That assistant surgeons shall rank with assistant surgeons in the Army." The latter statute is found in an act entitled "An act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes." (31 Stat. L., 684.)

It is difficult to understand by what theory claimant's counsel rely upon section 1168, Revised Statutes. It is as much out of place in the argument of this case as it would be in the decalog. The statutes that we have heretofore given are all the statutes and the only statutes that need be or should be considered in determining the claimant's right in this action. Having been placed by the navy personnel act upon the same pay and allowances, except forage, as an officer of corresponding rank in the Army, it is necessary to ascertain from section 1466 the army officer corresponding in rank with claimant. There is no other source and no other statute to which the mind of the investigator may be directed in seeking to ascertain the army officer with whom this claimant holds rank. Having learned his corresponding rank with the army officer, as shown by section 1466, Revised Statutes, claimant is necessitated to consult sections 1261 and 1262, Revised Statutes, for information as to what amount his brother army officer corresponding with claimant in rank receives in the way of compensation, and these statutes determine the claimant's pay. There

is no provision made by law or by regulation granting to this claimant, directly or indirectly, the increase of pay which he seeks.

It may be suggested that the Congress discriminated between assistant and passed assistant surgeons in giving to the former mounted pay and withholding it from the passed assistant surgeons. Why this discrimination, it is not necessary for us to determine. It certainly is not for the court to make the correction if an injustice has been done to any one class of naval officers. That is a matter for the Congress, and if a discrimination exists Congress is the proper authority to provide the remedy. It is not the province of the courts to read into a statute that which does not exist or to provide legislation where there is an absence of legislation in order to correct an inequality or injustice.

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AMMEN FARENHOLT.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

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APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLÆE.

I. Statement of the Case.

Introductory.

This is a claim by a passed assistant surgeon of the navy with the rank of lieutenant for pay corresponding to that of a mounted officer of corresponding rank in the army from December 26, 1900, to July 27, 1901. The claimant has been paid at mounted rates before and since the period covered by his claim under decisions of the Court of Claims and Controller of the Treasury to be presently referred to. He failed to receive it for the period covered by the claim only for the reason that the Treasury Department had made a prior settlement for the same period and for that reason considered that it was deprived of jurisdiction over the claim.